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Nos. 08–217 and 08–218

IN THE
Supreme Court of the United States

CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,
Respondents.

On Petitions For Writs Of Certiorari To The Supreme Court Of West Virginia (No. 08–217) And Circuit Court Of Brooke County, West Virginia (No. 08–218)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

DAVID B. FAWCETT*
GREGORY J. KROCK

BUCHANAN INGERSOLL & ROONEY
One Oxford Center
301 Grant Street, 20th Floor
Pittsburgh, PA 15219–1410
(412) 562–8800
*Counsel of Record
Counsel for Respondents

QUESTIONS PRESENTED

1. Did the extensive post–trial and appellate procedures followed by West Virginia's courts in reviewing the punitive damage awards in this case—which included a post–trial hearing and review of the evidence by the trial court, and then *de novo* review by the West Virginia Supreme Court of Appeals—satisfy the Due Process Clause?

2. Does the Due Process Clause require the recusal of an appellate court justice who, in accordance with the justice's right to comment on matters affecting the administration of justice, has criticized a corporation's political efforts to influence the appellate court?

3. Did a trial judge who conducted a *de novo* review of punitive damage awards that are each less than one–half of the compensatory award, and issued thirty–two (32) separate findings and conclusions explaining the grounds for upholding the punitive awards, violate the Due Process Clause by failing to provide meaningful review?

RULE 29.6 STATEMENT

Wheeling Pittsburgh Steel Corporation is now known as Severstal Wheeling, Inc. Severstal Wheeling, Inc. is a subsidiary of Severstal US Holdings, LLC, which is a subsidiary of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Severstal Wheeling, Inc.

Mountain State Carbon, LLC is a Delaware limited liability company. Its members are Severstal Wheeling, Inc. and SNA Carbon, LLC. Both members are indirect subsidiaries of OAO Severstal, a publicly–traded company on the London Stock Exchange. No other publicly–traded company has any ownership interest in Mountain State Carbon, LLC.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Wheeling Pittsburgh Steel Corporation ("Wheeling Pitt") and Mountain State Carbon, LLC ("Mountain State") respectfully submit this brief in opposition to the petitions for writs of certiorari regarding the rulings of the Supreme Court of Appeals of West Virginia (No. 08–217) and the Circuit Court of Brooke County, West Virginia (No. 08–218).

COUNTER–STATEMENT OF THE CASE

Petitioners attack the constitutionality of punitive damage awards that (1) a properly–instructed jury imposed after a five–week trial; (2) the trial judge upheld after requiring extensive post–trial briefing and oral argument; and (3) the appellate court reviewed *de novo,* after receiving the entire trial record and petitioners' summary of the relevant evidence, and rejected further review by a vote of five to zero.[1] The principal premise underlying the arguments raised by petitioners and their *amici* is that the West Virginia courts provided little or no review of the punitive damage awards imposed by the jury. In reality, both the Trial Court and WV Supreme Court adequately reviewed the awards.

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[1] For ease of reference, the Circuit Court of Brooke County, West Virginia is identified herein as the "Trial Court" and the West Virginia Supreme Court of Appeals is identified as the "WV Supreme Court."

Indeed, following this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the WV Supreme Court delineated detailed and extensive procedures for reviewing punitive damage awards in West Virginia. These procedures include an independent post–trial review of the evidence by the trial judge under exacting standards and then a merits–based review by the WV Supreme Court during the petition phase of the appellate process. The Trial Court and WV Supreme Court followed these extensive procedures in this case.

Thus, this case does not involve the denial of judicial or appellate review, but instead petitioners' request for *more* or *different* review. Petitioners want the Trial Court to explain, even more than it has already explained in the 32 separate findings of fact and conclusions of law set forth in its opinion upholding the punitive damage awards, the bases for its conclusion that the awards were appropriate. Presumably, they want the WV Supreme Court to entertain oral argument and issue a detailed written opinion supporting the conclusion that it reached after a *de novo* review. In support of their argument, petitioners note that other states (except for Virginia) choose to provide judicial review of punitive damage awards in a manner that differs from West Virginia, and ask this Court to instruct West Virginia to change its judicial system to conform with those states' systems.

This Court's function, however, is not to determine which state's judicial system is preferable. Nor is it this Court's role to require unanimity among the states. As it has done in the past in

response to similar petitions attacking West Virginia's judicial system, this Court should once again refuse to second–guess the judicial procedures adopted by West Virginia and it should deny the petitions.

A. Wheeling Pitt's Fraud Claim

This case involves more than a routine breach of contract. Instead, the case involves an extensive fraudulent scheme that petitioners undertook over a period of several years with full knowledge that their misconduct might cause catastrophic harm to Wheeling Pitt's business.

In particular, the jury found that petitioners made a series of misrepresentations to create the illusion that "events beyond their control" caused delivery shortfalls of coal and resultant damage to Wheeling Pitt's coke plant, when in fact petitioners were opportunely choosing to sell their coal to other customers to take advantage of skyrocketing coal prices on the world market. This fraudulent scheme was designed to induce Wheeling Pitt to remain in its long–term supply contract with Central West Virginia Energy Company ("CWVEC"), an indirect subsidiary of Massey Energy Company ("Massey Energy"),[2] under which it paid CWVEC tens of millions of dollars per year. The contract required Wheeling Pitt to purchase more than one million tons of high volatile metallurgical coal per year, which often amounted to more than 10% of Massey's

[2] Massey Energy and all of its direct and indirect subsidiaries are collectively identified herein as "Massey."

annual production. Thus, the scheme's dual purpose was to retain Wheeling Pitt as a long–term customer while maximizing Massey Energy's profits by diverting coal from Wheeling Pitt to higher–paying export customers.

B. Evidence of Fraud Introduced at Trial

When the worldwide price for metallurgical coal skyrocketed in late 2003 and early 2004, Massey Energy directed its subsidiaries to solicit and enter into new contracts with export customers at high prices. Tr. 3318, 3408. Massey was aware, however, that it could not produce and deliver enough coal to satisfy both these new contracts and existing contracts. Pl. Ex. 215A (internal Massey memo acknowledging that shipping to the new export customers could "run domestic customers out of coal"); Pl. Ex. 245. Massey nevertheless entered into the new contracts, prioritized shipments to its new high–priced customers, and received tens of millions of additional dollars for its coal. Tr. 4608–10; Pl. Ex. 519E.

CWVEC then drastically curtailed the required shipments to Wheeling Pitt. CWVEC failed to deliver nearly 500,000 tons to Wheeling Pitt in 2004 (approximately 42% of Wheeling Pitt's requirements that year). Pl. Ex. 490D. Massey was well aware that these delivery failures would cause grave injury to Wheeling Pitt in the form of increased costs of acquiring coal and physical harm to Wheeling Pitt's coke plant. Tr. 953–54. These damages were so extensive that they jeopardized Wheeling Pitt's very existence. *Id.* During the same

time period, Massey delivered more than 1 million tons of high volatile metallurgical coal to new export customers to whom it had not budgeted to sell a single ton of coal in 2004. Tr. 1396; Pl. Ex. 519E. Massey could have used this coal to honor CWVEC's contractual obligations to Wheeling Pitt, but instead chose to sell it to new customers at higher prices.

Petitioners made numerous fraudulent misrepresentations to Wheeling Pitt to prevent it from discovering their scheme and to keep it from terminating the contract, filing a lawsuit, or taking other remedial actions in response to CWVEC's delivery failures. First, petitioners falsely represented that Massey experienced unexpected and catastrophic labor, transportation, and mining problems in order to deceive Wheeling Pitt into believing that the delivery failures were both temporary and unavoidable. Massey issued 28 separate letters over a roughly two–year period purporting to declare force majeure as an excuse for CWVEC's delivery failures.[3] Pl. Ex. 165A–165C. Many of these representations were blatantly false. For example:

- Petitioners falsely represented that Massey experienced catastrophic railcar shortages in 2004 and 2005. In reality, Massey received

[3] In contrast, CWVEC declared only one event of force majeure during the first 10 years that the contract was in effect. Tr. 614–42.

more railcars in 2004 and 2005 than the previous years.[4] Tr. 4616–19.

- Petitioners falsely represented that Massey experienced severe labor shortages. In reality, Massey employed more workers in 2004 than 2003, and then even more workers in 2005. Pl. Exs. 391, 398.

- Petitioners falsely represented that Massey experienced unforeseen mining conditions that decreased its production. In reality, Massey's own documents proved that the conditions either (1) were anticipated by Massey or (2) did not materially affect production. Tr. 2209–30.

Second, Petitioners falsely represented that diligent remedial efforts were being undertaken to enable CWVEC to deliver the required coal to Wheeling Pitt. But, contrary to petitioners' contention, Massey did not make capital expenditures or purchase coal in order to fulfill promises to Wheeling Pitt. For example, Massey did in fact invest millions of dollars and open a new mine that produced coal that almost perfectly matched Wheeling Pitt's specifications at the very

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[4] In fact, the president of the railroad company (CSX Transportation) sent a note to Massey stating that CSX had provided 10% *more* rail service to Massey, and was therefore not to blame for CWVEC's failure to deliver nearly 50% of Wheeling Pitt's coal. CSX further stated that it was Massey, and not CSX, that decided where to ship Massey's coal. Pl. Ex. 208.

time that CWVEC was delivering only a fraction of the required coal to Wheeling Pitt. However, the coal from this new mine—which Wheeling Pitt desperately needed—was *not* intended for Wheeling Pitt as Massey claimed. Instead, Massey entered into a new contract to ship the coal to a new customer at a price that was more than twice the amount that Wheeling Pitt was paying for its coal. Tr. 3680–86; Pl. Ex. 328. Petitioners' contention that Massey was increasing its purchases from third–party coal producers to supplement its own production in order to get coal to Wheeling Pitt was similarly false. Massey's coal purchases actually *decreased* during in 2004 and 2005. Tr. 2395–96.

Third, petitioners failed to disclose that—at the very same time that they were representing that Massey had suffered catastrophic problems, but was doing everything possible to remedy them and increase shipments to Wheeling Pitt—Massey was entering into still more contracts to sell hundreds of thousands of additional tons of high volatile metallurgical coal to new export customers. Tr. 976. The failure to disclose these substantial new commitments was also intended to maintain the false assurances that Wheeling Pitt would receive its required coal in the future. When Wheeling Pitt ultimately learned through industry periodicals that Massey was engaged in significant export sales, and inquired about them, Massey's metallurgical salesman falsely stated that the sales involved "steam" coal that would not meet Wheeling Pitt's specifications. *Id.* at 599–600.

Petitioners had a powerful financial motive to undertake this fraudulent scheme. The parties' contract contained a price re–opener provision that enabled CWVEC to adjust the price that it charged Wheeling Pitt in 2007. CWVEC would therefore be able to require Wheeling Pitt to pay the then–existing market price in 2007. *Id.* at 695–97. Petitioners' scheme was to ship as little coal as necessary to keep the contract with Wheeling Pitt alive until the price re–opener took effect, and take maximum advantage of the soaring coal prices in the meantime.

C. The Trial Court's Review of the Punitive Damage Awards

At the end of the five–week trial, the jury—in a series of special interrogatories—found by clear and convincing evidence that petitioners made fraudulent misrepresentations upon which Wheeling Pitt relied. Verdict Form, ¶¶ 7, 11. The jury determined that the misrepresentations caused Wheeling Pitt to incur $10.75 million in damage to one of its coke batteries, $45.1 million in increased costs of acquiring coal, and $64 million in increased costs associated with acquiring coke. *Id.* at ¶¶ 8, 12. In total, the jury awarded Wheeling Pitt compensatory damages in the amount of $119.5 million. Because the jury found petitioners' fraudulent scheme and misrepresentations to be malicious, wanton, and oppressive, it also imposed $50 million in punitive damages upon each petitioner. *Id.* at ¶¶ 9–10, 13–14. The punitive damage to compensatory ratio in this case is therefore approximately 0.4:1— less than ½ to one.

Shortly after the jury entered its verdict, Wheeling Pitt moved the Trial Court to uphold the punitive damage awards and enter judgment pursuant to the procedures that the WV Supreme Court established for post–trial review of punitive damage awards in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). Wheeling Pitt filed a brief summarizing the evidence and setting forth the bases for upholding the awards. In their 27–page opposition brief, petitioners argued that the awards were improper and excessive based on the evidence introduced at trial. Petitioners also attempted to submit new evidence, in the form of affidavits and spreadsheets, regarding the amount of profit that they received by defrauding Wheeling Pitt.

After conducting a lengthy hearing on the motion, the Trial Court upheld the punitive damage awards and entered judgment. In the portion of the Order addressing punitive damages, the Trial Court included 32 separately–numbered paragraphs setting forth its findings of fact and conclusions of law. Pet. App. 24a–31a. The Trial Court determined that petitioners sold coal to higher–paying customers, misrepresented that they did not control the routes of their railcars, used their available railcars to ship coal to the higher–paying customers, failed to disclose the new export sales, concealed their scheme, and did everything they could—over a two–year time period—to keep Wheeling Pitt in the contract and prevent it from exercising its rights. *Id.* at 28a–31a. The Trial Court concluded that this conduct was so reprehensible that it warranted the punitive damage awards. *Id.* The Trial Court further determined

that the punitive damage awards bear a reasonable relationship to the harm caused by petitioners, especially given that even the amount of the punitive damage awards *combined* is less than the amount of compensatory damages. *Id.* at 29a.

D. The West Virginia Supreme Court's *De Novo* Review

Petitioners filed their petitions for appeal with the WV Supreme Court in December 2007. After receiving leave to file amended petitions in excess of the 50–page limit, petitioners filed amended petitions in March 2008. CWVEC's amended petition contained 65 pages and Massey Energy's contained 75 pages. Petitioners devoted a significant portion of their amended petitions to challenging the punitive damage awards. On January 10, 2008—three months *before* petitioners filed their amended petitions, the Trial Court sent the entire trial record to the WV Supreme Court. *See* Respondents' Appendix (excerpt of docket from Trial Court evidencing submission of the record to the WV Supreme Court) at 1b–2b.[5]

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[5] Petitioners initially moved to recuse Justice Larry Starcher on December 10, 2007. Petitioners identified 11 statements that Justice Starcher made about Massey and/or its Chief Executive Officer, Don Blankenship, which they claimed to evidence his bias against Massey. Ten of those statements pertained to a specific topic—Massey's political involvement in attempts to elect candidates that it favors to the WV Supreme Court. Petitioners based their recusal motion exclusively on the ethical canons and laws of West Virginia. They did not cite to the United States Constitution, refer to federal due process,

After receiving the trial record, lengthy amended petitions, and respondents' opposition briefs, the WV Supreme Court conducted a *de novo* review of the punitive damage awards. *Boyd v. Goffoli*, 608 S.E.2d 169, 176 (W. Va. 2004) (the WV Supreme Court provides *de novo* review to punitive damage awards). The WV Supreme Court concluded that further review was unwarranted and, by order dated May 22, 2008, refused the amended petitions by a unanimous vote of five to zero.

REASONS FOR DENYING CERTIORARI

A. Certiorari Is Not Warranted Because Petitioners Failed to Preserve a Due Process Challenge to West Virginia's System of Appellate Review and Received All of the Process That They Were Due

This Court should deny review of petitioners' claim that the West Virginia courts failed to provide appellate review for three independent reasons. First, petitioners have waived the issue by failing to raise it with the WV Supreme Court. Second, it is well established that the Due Process Clause does not require appellate review in either civil or criminal cases. Third, the WV Supreme Court

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or rely upon federal law. Petitioners later filed three supplemental motions and/or submissions in which they renewed their request that Justice Starcher recuse himself. In none of these supplemental filings did petitioners cite to or otherwise rely upon federal law.

nevertheless conducted a *de novo* review of the punitive damage awards in this case.

1. Petitioners Have Not Preserved the Issue by Raising It With the WV Supreme Court

"It is well settled that this Court will not review a final judgment of a state court unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (internal quotation omitted). This Court has recognized an exception to the rule, however, where the highest state court renders an unexpected interpretation of state law. *Herndon v. Georgia*, 295 U.S. 441, 443–44 (1935),

In *Herndon*, this Court held that an interpretation cannot be "unexpected"—and must be challenged below—if the state court announced that same interpretation in the past. The petitioner in *Herndon* alleged that a statute criminalizing attempts to incite insurrection was unconstitutional because it did not require that "immediate serious violence against the State of Georgia was to be expected or advocated." *Id.* at 444. The petitioner had not raised this argument below, however. This Court rejected the petitioner's argument that the issue involved an unexpected interpretation of state law because the state court had recently ruled (in a dispute known as the "Carr Case") that proof of imminent violence was not a required element under the statute. *Id.* at 445–46. The Court explained that

the petitioner could not " plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in its own case, and preserve his right to review here by appropriate action upon the original hearing in the court below." *Id.* at 446.

Herdon is directly on point. It is undisputed that petitioners did not argue below that the United States Constitution *required* the WV Supreme Court to accept the appeal and provide further review. Nor can petitioners contend that the WV Supreme Court's decision was unexpected. The WV Supreme Court has consistently stated, for almost 20 years, that it reviews punitive damage awards at the petition for appeal stage and that further review is not necessarily required. *Garnes*, 413 S.E.2d at 910 ("After the trial court has examined and ruled on the punitive damages award, the losing party may petition for appeal to this Court. In our review of the petition, we will consider all of the same factors that we require the jury and trial judge to consider ..."); *Pote v. Jarrell*, 412 S.E.2d 770, 777 (W. Va. 1991) ("[M]erely because error relating to a punitive award is asserted in the petition, that appeal will not automatically be granted on the punitive damage point alone.").

Petitioners cannot plead ignorance of these authorities. If petitioners believed that the Due Process Clause required the WV Supreme Court to accept their appeal for further review, then they were required to raise the issue below and afford the WV Supreme Court the opportunity to rule upon it.

Petitioners' failure to do so precludes them from raising the issue in this Court.

2. Due Process Does Not Require Appellate Review of Punitive Damage Awards

Petitioners contend that "[t]his Court's decisions establish a due–process right to appellate review of punitive–damages awards." Petition for a Writ of Certiorari (No. 08–217) at 2. This contention is inaccurate. The Court has consistently proclaimed, for nearly a century, that the Due Process Clause does not require a state to provide appellate review of its trial court's rulings. *M.L.B. v. S.L.J.*, 519 U.S. 102, 114 (1996) (Due Process Clause does not require states to provide appellate review of orders terminating parental rights); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit Cty.*, 281 U.S. 74, 80 (1930).

This Court's decisions involving punitive damage awards do not alter its long–standing position that states are not required to provide appellate review. In *Haslip*, the Court held only that Alabama's appellate review of punitive damage awards provided "an additional check" on the jury's discretion. *Haslip*, 499 U.S. at 20. Several of the concurring justices wrote separately, however, to underscore that the Court was not requiring—and

cannot require—other states to adopt Alabama's system of imposing punitive damages. *Id.* at 24–25 (Scalia, J., concurring) (ruling is limited to the constitutionality of Alabama's particular procedures as applied, which "provides no guidance as to whether any *other* procedures" would be constitutional); *id.* at 42 (Kennedy, J., concurring) ("We do not have the authority ... to alter the rules of common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination.").

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that Oregon's statute which prohibited any judicial review of punitive damage awards, "without providing any substitute procedure" to safeguard against a jury's bias in imposing punitive damages, was unconstitutional. *Id.* at 432. The Court did not require Oregon to provide appellate review. *Id.* Rather, it recognized that Oregon could satisfy due process by providing "substitute" procedures. *Id.*

Nearly a decade later, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court granted certiorari to resolve a split in the circuits as to the proper standard of appellate review of punitive damage awards imposed by federal district courts. *Id.* at 426, 431. While the Court held that circuit courts must provide a *de novo* review of punitive damage awards imposed by district courts, its ruling was not premised on constitutional principles applicable to state courts. *Id.* at 436. Even if it were, however, such a ruling

would still not require states to afford defendants a right to appeal such awards. In fact, this Court has held that appellate courts must apply a *de novo* standard of review to several types of rulings in criminal cases. *See United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (requiring *de novo* review of whether a criminal fine is excessive under the Eighth Amendment); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (determinations of reasonable suspicion and probable cause must be reviewed *de novo* on appeal). Even after issuing these opinions, however, the Court reaffirmed that the Due Process Clause does not require states to provide any appellate review in criminal cases. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."). *Cooper* therefore leaves undisturbed the well–established principle that, even where punitive damages are awarded, civil litigants do not possess a constitutional right to appeal.

In short, this Court has unambiguously and repeatedly stated that the Due Process Clause does not require states to provide appellate review of trial court decisions. The Court has not held otherwise in its opinions addressing due process associated with the imposition of punitive damage awards. Petitioners' suggestion that the Court implicitly overturned nearly century–old pronouncements—by requiring that, if a federal appellate court reviews a punitive damage award, the review be *de novo*—is baseless.

3. In Any Event, the WV Supreme Court Provided a *De Novo* Review of the Punitive Damage Awards

Even if this Court were inclined to reconsider its decisions holding that civil litigants do not have a constitutional right to appeal, this case would not be an appropriate vehicle for doing so because the WV Supreme Court substantively reviewed the merits of the punitive damage awards when considering the petitioners' amended petitions. Like every other West Virginia defendant against whom punitive damages are awarded, petitioners were therefore afforded meaningful appellate review of those awards.

The WV Supreme Court has made it clear that, out of "concern that there be ... a meaningful adequate review" of punitive damage awards, it reviews punitive damage awards in the context of petitions for appeal. *Garnes*, 413 S.E.2d at 908–10. In *Garnes*, the WV Supreme Court expressly announced the procedure for appellate review of punitive damages in West Virginia. *Id.* A party challenging a punitive damage award must file a petition for appeal which (1) addresses with specificity each factor that the jury and trial court are permitted to consider and (2) summarizes the evidence presented to the jury or trial judge during the post–judgment review. *Id.* Petitioners must not simply advance policy or societal reasons for taking the appeal, but instead must specifically address the merits of the appeal (*i.e.*, whether punitive damages are proper and justified based on the trial evidence). *Id.; see also Alkire v. First Nat'l Bank of Parsons*,

475 S.E.2d 122, 130–31 (W. Va. 1996) ("*upon petition*, this Court will review the amount of the punitive damages award, applying the standard specified in ...*Garnes*") (emphasis added).

The WV Supreme Court revisited this standard in *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997). The WV Supreme Court concluded that the review process set forth in *Garnes* is consistent with this Court's guideposts in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and therefore should remain the proper standard for reviewing punitive damage awards. *Vandevender*, 490 S.E.2d at 692–93. The WV Supreme Court has also clarified that it applies a *de novo* review of the punitive damage award during the petition for appeal stage of the proceeding. *Boyd*, 608 S.E.2d at 176–77 ("As a preliminary matter, we note that our review of this issue is *de novo*.").

Petitioners are not the first litigants to challenge the constitutionality of West Virginia's system of appellate review. In other civil and criminal cases, defendants have asked courts—including this Court—to require West Virginia to modify its judicial system. In each instance, the courts refused to invalidate West Virginia's judicial system as unconstitutional.

For example, in *Billotti v. Legursky*, 975 F.2d 113, (4th Cir. 1992), a criminal defendant petitioned for a writ of habeas corpus in federal court when the WV Supreme Court refused his petition for appeal

challenging his murder conviction. *Id.* at 115.[6] The district court dismissed the petition and the Fourth Circuit affirmed, holding that West Virginia's judicial system did not violate the Due Process Clause. *Id.* at 115–16. The Fourth Circuit concluded that West Virginia afforded the defendant an adequate opportunity to challenge his conviction at the petition for appeal stage, and that—while West Virginia's judicial system differs from most other states' systems—it is not the federal court's role to determine which state's judicial system is "preferable." *Id.* at 116. The defendant petitioned for certiorari and this Court denied the petition. *See Billotti v. Legursky*, 507 U.S. 984 (1993).

This Court has also previously denied petitions for certiorari alleging that the WV Supreme Court should be required to grant petitions for appeal and provide further review of punitive damage awards. In *Mountain Enterprises, Inc. v. Fitch*, No. 03–1223, 2004 WL 367611 (U.S. Feb. 26, 2004), the petitioner urged this Court to grant review of a West Virginia punitive damages award and recognize a right to additional appellate review of such awards. *Id.* at *13. The Court denied the petition. *Mountain Enterprises, Inc. v. Fitch*, 541

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[6] In the underlying proceeding, the WV State Court rejected the contention that due process mandates that a defendant convicted of first–degree murder receive "full appellate review." *Billotti v. Dodrill*, 394 S.E.2d 32, 36–37 (W. Va. 1990). The WV Supreme Court concluded that its review of the petition for appeal constitutes appellate review, so the defendant's contention that he received no appellate review—the very same contention that petitions raise in this case—was unfounded. *Id.* at 40.

U.S. 989 (2004). In *Camden–Clark Memorial Hospital Corp. v. Boggs*, No. 07–812, 2007 WL 4458908 (U.S. Dec. 18, 2007), the petitioner made the very same arguments that petitioners herein advance—that this Court has implicitly ruled that the Due Process Clause requires more than appellate review of punitive damage awards at the petition for appeal stage. *Id.* at 8–12, 17–19. This Court denied the petition for certiorari only months ago. *Camden–Clark Memorial Hosp. Corp. v. Boggs*, 128 S. Ct. 2080 (2008).[7]

The Court should similarly deny the petitions in this case. The WV Supreme Court has unambiguously pronounced, in *Garnes* and its progeny, that it provides *de novo* review of punitive damage awards at the petition stage—including a review of the facts, evidence, and arguments addressing each factor that the jury and trial judge were required to consider. Each petitioner in this case was granted leave to exceed the 50–page limit applicable to petitions for appeal, and submitted separate amended petitions that specifically

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[7] Unlike petitioners in this case, the petitioners in *Mountain Enterprises* and *Camden–Clark* preserved the issue for appeal by arguing to the WV Supreme Court, in conjunction with their petitions for appeal, that the Due Process Clause of the Fourteenth Amendment required the WV Supreme Court to allow their appeals and provide further review. *See Mountain Enterprises*, 2004 WL 367611, at *9 (petitioner filed a motion for reconsideration with the WV Supreme Court arguing that the Due Process Clause required it to grant the petition); *Camden–Clark*, 2007 WL 4458908, at *6 (petitioner argued in its petition to the WV Supreme Court that the Due Process Clause required the WV Supreme Court to grant the petition).

addressed the factors and evidence that the jury and Trial Court considered in imposing the punitive damage awards. The WV Supreme Court received the entire trial record several months before petitioners filed their amended petitions and, therefore, had all of the evidence that was presented to the Trial Court. After conducting its *de novo* review, the WV Supreme Court determined that further review was unnecessary and refused the amended petition. Under these circumstances, there is no doubt that petitioners had a fair opportunity to present their allegations of error to the WV Supreme Court.

The fact that the WV Supreme Court elected not to provide any further review in this case, or issue a written opinion explaining the results of its review of the amended petitions, simply does not amount to a deprivation of due process.[8] This Court's role is not to micromanage state court systems or otherwise require unanimity among the states. The fact that other courts provide appellate review in a manner that differs from West Virginia (and Virginia) is irrelevant. It is not this Court's function to evaluate which state's system is better, fairer, or wiser. This Court's only role to determine whether West Virginia's system comports with the Due Process Clause. The WV Supreme Court's *de*

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[8] It is well established that the Due Process Clause does not require that courts issue written opinions that set forth in detail the bases for their findings. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464–65 (1993); *Black v. Romano*, 471 U.S. 606, 613–14 (1985); *Harris v. Rivera*, 454 U.S. 339, 345 & n.11 (1981); *Arizona v. Washington*, 434 U.S. 497, 516–17 (1978).

novo review of the facts and evidence at the petition stage unquestionably satisfies due process. Condemning the WV Supreme Court simply because it may perform appellate review on a petition for appeal is inconsistent with the substantial leeway that states enjoy "to define ... rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008).

B. Certiorari is Not Warranted to Second Guess Justice Starcher's Decision Not to Recuse Himself Under the Unique Facts of this Case

This Court should also deny review of Justice Larry Starcher's decision not to recuse himself from this case. First, petitioners have waived the issue by failing to raise their federal due process challenge with the WV Supreme Court. Second, Justice Starcher's criticism of Massey's political involvement with the WV Supreme Court—and its attempt to influence the administration of justice—was entirely appropriate and did not demonstrate a bias against the company. Third, Justice Starcher did not acknowledge that his statements were evidence of bias, and his recusal in another case involving Massey (for other reasons) did not require his recusal in this case.

1. Petitioners Have Not Preserved a Constitutional Challenge to Justice Starcher's Refusal to Recuse

Congress has empowered this Court to review only those state court decisions involving rights that

are "specially set up or claimed" under the Constitution or statutes of the United States. 28 U.S.C. § 1257(a)(2007); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). The petitioner bears the burden of demonstrating to this Court that it presented the federal issue to the state court with fair precision. *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) ("we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *Webb v. Webb*, 451 U.S. 493, 499 (1981).

This Court has repeatedly held that general references in state court pleadings to certain rights that are available under the United States Constitution, including references to "due process," are insufficient to properly present a federal claim. *Adams*, 520 U.S. at 88–89 & n.3 (passing references to "due process," which could have referred to rights under the federal or Alabama Constitution, did not clearly present a federal claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77–78 (1988) (general reference to punitive damage award as violating constitutional principles did not make it clear that petitioner was alleging a violation of the Due Process Clause of the Fourteenth Amendment); *Webb*, 451 U.S. at 496 (references to "full faith and credit," without citing to the Federal Constitution or to cases relying upon it, did not clearly assert a federal claim). The federal claim must be addressed specifically in the state court pleadings so that "there should be no doubt from the record that a claim under *federal* statute or the *Federal*

Constitution was presented in the state courts." *Webb*, 451 U.S. at 501.

Petitioners did not raise a federal issue in the WV Supreme Court in conjunction with their requests that Justice Starcher recuse himself. In the introductory paragraph of their Joint Motion to Recuse the Honorable Larry Starcher, and throughout the ensuing twelve numbered paragraphs, petitioners repeatedly invoked Rule 29 of the West Virginia Rules of Appellate Procedure and Canon 3(E)(1)(a) of the West Virginia Code of Judicial Conduct as the legal basis for their recusal request. Nowhere did petitioners cite or otherwise refer to the Fourteenth Amendment of the United States Constitution. Indeed, they made only one passing reference to due process in general, stating that the "underlying rationale for disqualification is based on principles of due process." Petitioners then cited to a West Virginia state–law case—*Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976)—as the basis for their assertion.

Petitioners' subsequent filings further establish that their claims were based exclusively on state law. Petitioners filed a Renewed Joint Motion to Recuse the Honorable Larry Starcher on approximately March 8, 2008 and a third filing, entitled Petitioners' Joint Submission in Support of their Renewed Motion to Recuse the Honorable Larry Starcher, just a few weeks later on March 28, 2008. In each, petitioners argued that Justice Starcher's purported comments about Massey constituted grounds for recusal "in accordance with the mandates of Rule 29 of the West Virginia Rules

of Appellate Procedure and Canon 3E of the West Virginia Code of Judicial Conduct." Finally, petitioners filed a Second Joint Submission in Supplementation of their Renewed Motion to Recuse the Honorable Larry Starcher on or around April 4, 2008. Petitioners also repeatedly referred to Rule 29 and Canon 3 in this 8–paragraph submission. Nowhere in any of these filings did petitioners argue that Justice Starcher's failure to recuse himself would violate the Due Process Clause or any other provision of the Untied States Constitution.

Because petitioners did not argue that the Due Process Clause of the Fourteenth Amendment required Justice Starcher to recuse himself, this Court lacks jurisdiction to consider this issue.

2. Certiorari is Not Warranted to Apply Well–Established Law on Bias to Justice Starcher's Comments About Massey's Efforts to Influence the WV Supreme Court

The highly–unique facts surrounding the motion to recuse Justice Starcher in this case—including the political activities of Massey and Mr. Blankenship undertaken to influence the composition of the WV Supreme Court, Justice Starcher's criticism of those efforts, the public perception of the entire WV Supreme Court, and the Justices' action (or inaction) to address that perception—render this case inappropriate for certiorari. The case does not involve a conflict among federal courts or between a federal court and a state court regarding a federal issue. *See* S. Ct.

Rule 10(a)(2008). It does not involve a conflict among the state courts of last resort regarding an important federal issue. *Id.* at 10(b). It does not involve an important federal question that has not been, but should be, settled by this Court. *Id.* at 10(c). This case involves nothing more than petitioners' assertion that Justice Starcher misapplied well–established recusal law in the highly unique facts of this particular case.

Ironically, the amicus brief filed by the National Mining Association ("NMA") succinctly summarizes the reason that this Court should not review Justice Starcher's recusal analysis. The NMA correctly states that "this Court's charge is not to sit as a court of error correction; the Court 'rarely' grants certiorari 'where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.' S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances." Brief Amicus Curiae of the National Mining Association in Support of Petitioners, p. 7. Petitioners do not ask this Court to articulate or explicate the law regarding recusal based on statements evidencing bias. That law is well established. Instead, petitioners ask this Court to correct Justice Starcher's purported misapplication of that law to the unique factual circumstances of this case. The Court should not grant certiorari for this purpose and sit as a court of error correction.

Furthermore, Justice Starcher's criticism of Massey's conduct did not require his recusal under

well–established law on bias. The fact that a judge publicly disapproves of a party's conduct generally does not require the judge's recusal in cases involving that party. As one Circuit Court has explained:

> [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair–minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep–rooted than an attitude of disapproval towards certain persons because of their known conduct, unless the attitude is somehow related also to suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.

United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). Extrajudicial comments only establish bias if they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *Christo v. Padgett*, 223 F.3d 1324, 1333–34 (11th Cir. 2000); *see also United States v. Salemme*, 164 F. Supp.2d 86, 105 (D. Mass. 1998) ("judges are usually

longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially.").[9]

The Ninth Circuit's ruling in *Conforte* is particularly instructive. Following a bench trial in that case, the defendants were convicted of tax evasion in conjunction with their operation of a legalized house of prostitution in Nevada. *Conforte*, 624 F.2d at 873. The defendants asserted that the trial judge was biased, and should have been disqualified, because he had previously (1) advised the University of Nevada not to accept contributions from defendants because they were "not good for Reno" and (2) rejected defendants' application for membership in the American Contract Bridge League's Reno United when the judge was serving as its president. *Id.* at 878–79. The Ninth Circuit concluded that the trial judge's disapproval of the defendants' conduct, in operating a brothel, did not establish such a deep–rooted animus against them that required his disqualification—even though the case was a bench trial involving the operation of the brothel, the very conduct that the judge criticized. *Id.* at 881.

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[9] West Virginia applies the same standard for evaluating potential bias. *Taylor Cty. Comm'n v. Spencer*, 285 S.E.2d 656, 664 (W. Va. 1981) (judge's comments that unfavorably compared the court's facilities to those of the county commissioners did not establish a bias that required him to recuse himself from a case involving the county commission).

In this case, petitioners mischaracterize Justice Starcher's comments by ignoring their context and arguing that they demonstrate "personal antagonism" against Massey and Mr. Blankenship. Petitioners overlook the fact that Justice Starcher's comments pertain to well known and highly–publicized efforts by Massey and Mr. Blankenship to elect new justices to the WV Supreme Court. In particular, 10 of the 11 comments that petitioners identified as evidence of bias in their original motion seeking Justice Starcher's recusal involved Justice Starcher's comments on very specific behavior of which he disapproved. Justice Starcher disapproved of Massey's attempts to exert influence over the WV Supreme Court, including Mr. Blankenship's vacation with one of the justices while cases involving Massey were pending, and Mr. Blankenship's staggering financial contributions in order to elect another justice that he favored. When viewed in the proper context, Justice Starcher's comments do not suggest that he harbors a deep–rooted, personal aversion or animus against Massey or Mr. Blankenship. His comments instead suggest that Justice Starcher disapproved of their efforts to exert an undue influence over the WV Supreme Court.

Because judges have unique knowledge and perspective involving issues that affect the administration of justice, ethical rules governing their conduct permit—and indeed encourage—them to comment on those issues. *See* West Virginia Canons of Judicial Conduct, Canon 4B, cmt. (2008) ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute

to the improvement of the law, the legal system, and the administration of justice ..."); *Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (reversing sanctions imposed upon a judge because his criticisms "dealt with the administration of the county justice system by county officials, a matter about which Scott, as an elected judge from that county, was likely to have well–informed opinions.").

Thus, although Justice Starcher was critical of Massey's and Mr. Blankenship's attempts to influence the administration of justice, his disapproval of those political activities does not evidence a deep–rooted and personal bias. Justice Starcher was therefore not constitutionally required to recuse himself in all cases involving Massey, particularly in cases—like this one—in which the political efforts of Massey and Mr. Blankenship are not at issue.

3. Petitioners' Reliance Upon Justice Starcher's Recusal in a Different Case Involving Massey is Misguided

Petitioners' recusal argument rests, in significant part, upon the fact that Justice Starcher recused himself from a different case involving Massey in the past. Their reliance upon Justice Starcher's conduct in another case is legally and factually misguided.

From a legal standpoint, the lower courts are in agreement that a judge's decisions to recuse in a particular case does not require recusal in a

subsequent case involving the same party. *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986) ("Judge Vela's disqualification was not required ... merely because he voluntarily withdrew from another case in which Elder was the defendant."); *In re Webster*, 382 F.2d 79, 84 (9th Cir. 1967) (fact that the judge recused himself in response to a similar motion in a different case is irrelevant and does not constitute an admission of bias); *Person v. General Motors Corp.*, 730 F. Supp. 516, 519 (W.D.N.Y. 1990) ("the fact that I recused myself from [an earlier case] does not mandate that I must recuse myself from the present case.").[10] As the Ninth Circuit has explained, a judge's decision to recuse is not an admission of bias:

> The fact that the judge, in response to a similar motion, disqualified himself in [earlier litigation], is immaterial. The judge may have then thought that, although not personally biased, certain of his remarks may have given Webster cause to believe that the judge was, for

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[10] State courts, including those in West Virginia, have similarly held that a judge's recusal in one case does not require subsequent recusals in cases involving the same party or issues. *In re Disqualification of Martin*, 657 N.E.2d 1334, 1334 (Ohio 1990) ("The voluntary recusal by a judge from an earlier case does not by itself support the judge's disqualification from another unrelated case involving the same party."); *Spencer*, 285 S.E.2d at 663–64 (rejecting argument that circuit court judge had admitted bias by previously disqualifying himself from a prior case involving the county commission, and therefore was required to recuse himself in subsequent cases involving the commission).

> the moment, somewhat less than objective in his consideration of Webster's argument. A judge who, out of an abundance of caution and a sincere desire to provide a fair hearing, takes such means to withdraw from a particular case, is not thereby committed to a consistent course of recusing himself in all subsequent cases involving the same party.

Webster, 382 F.2d at 84; *see also Person* 730 F. Supp. at 519 ("My decision to recuse myself [in a prior case] was neither an acknowledgment of the legal sufficiency of counsel's motion in that case, nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him."). In fact, judges sometimes disqualify themselves for reasons other than those set forth in a party's motion for recusal. *Merkt*, 794 F.2d at 960 (rejecting argument that judge's disqualification in a prior action constituted an admission of bias because, in that prior action, the judge's recusal order stated that the recusal was based on other reasons).

From a factual standpoint, Justice Starcher (like the judge in *Merkt*) expressly stated in recusing himself from the prior matter—*Caperton v. A.T. Massey Coal Co.*—that his reason for doing so *was not* because he was biased against Massey. On the contrary, Justice Starcher stated that he voluntarily reconsidered his prior decision not to recuse himself because of the public revelation that another member of the WV Supreme Court, Justice Elliot Maynard, had been engaged in secret and improper

dealings with Massey that had caused the public to scrutinize *all* of the Justices' relationships with Massey in a far different light. *See* Opinion in *Caperton* dated February 15, 2008. Justice Starcher explained in his 10–page opinion in *Caperton* that he was not "reversing" his prior decision as incorrectly made and, in fact, had properly refused to recuse himself from numerous cases involving Massey in the past because his public comments did not create the appearance that he could not be fair. *Id.* at pp. 1–2.

Justice Starcher recognized, however, that the recent developments involving Justice Maynard had at least temporarily changed the landscape in which the public viewed Massey's interactions with and influence over *all* members of the WV Supreme Court. *Id.* at pp. 3–4. Because these developments resulted in the case taking on "enormous public proportions," Justice Starcher recused himself in *Caperton* in an attempt to help restore confidence in the WV Supreme Court and its ability to fairly adjudicate disputes involving Massey. He simultaneously implored a third member of the WV Supreme Court, Justice Brent Benjamin, to recuse himself in light of the public outcry resulting from the fact that Mr. Blankenship had spent $3 million to assure Justice Benjamin's election to the WV Supreme Court. *Id.* at pp. 4–7.

When petitioners subsequently moved to recuse Justice Starcher in this case, the circumstances had changed. Justice Starcher therefore no longer believed that his recusal would be beneficial to the judicial system. Because Justice

Starcher was not biased, and was not obligated to recuse, he properly declined to recuse himself in this case. Petitioners' contention that he was obligated to do so because he recused himself in *Caperton* is baseless.

C. Certiorari is Not Warranted to Review the Trial Court's 32–Paragraph Findings of Fact and Conclusions of Law Upholding the Punitive Damage Awards

Petitioners' attack on the punitive damage awards, in a separate petition (08–218), is based entirely on a profound mischaracterization of the Trial Court's review of those awards. Petitioners argue that the Trial Court "rubber stamped" the punitive damage awards by "baldly" stating that (1) petitioners' conduct was reprehensible and (2) the punitive damage awards do not exceed the compensatory damages. *See* Petition for a Writ of Certiorari (No. 08–218) at i and 19–20. Nothing could be further from the truth.

First, the record below establishes that the Trial Court performed an exhaustive review of the punitive damage awards. The Trial Court received and reviewed lengthy post–trial briefs, including petitioners' 27–page brief in which they argued that the punitive damage awards were not justified. The Trial Court also entertained oral argument on the appropriateness of the punitive damage awards. Finally, the Trial Court entered a lengthy opinion, containing 32 separate findings of fact and conclusions of law that served as the bases for its conclusion that the punitive damage awards were

proper. Under these circumstances, petitioners' contention that the Trial Court merely "rubber stamped" the jury's punitive damage awards is specious.

Second, the Trial Court's description of petitioners' conduct involved far more than making a "bald statement" that petitioners' conduct was reprehensible. The Trial Court expressly identified a number of the facts that made petitioners' conduct particularly reprehensible. The Trial Court also stated that the substantial costs of prosecuting the case, which required a massive amount of discovery and a five–week trial further supported the punitive damage awards. The Trial Court clearly did not simply assert that petitioners' conduct was reprehensible, but instead provided a reasoned explanation for its conclusion that petitioners' conduct was so reprehensible that it justified the punitive damage awards.

Third, the Trial Court's extensive analysis in its opinion disproves petitioners' assertion that the Trial Court "treated a low ratio of punitive to compensatory damages as a safe harbor, upholding [the] multi–million–dollar punitive awards without regard to the reprehensibility of the conduct." The ratio of punitive to compensatory damages—the second of the three guideposts set forth in *BMW*—is unquestionably one of the most critical factors in the review of a punitive damage award. The Trial Court properly considered this factor, noting that the punitive damage awards bore a reasonable relationship to the compensatory damages caused and awarded, and that the punitive damage awards

when combined together are still less than the compensatory damage award.[11] This analysis, combined with the 31 additional paragraphs detailing the Trial Court's other grounds for upholding the punitive damage awards, conclusively demonstrates that the Trial Court did not simply "rubber stamp" the punitive damage awards because they were merely 42% of the compensatory damage award.

Finally, while petitioners contend that granting certiorari would provide lower courts with "needed guidance," they do not set forth the nature of the guidance that they seek. Petitioners are not seeking to modify or supplement the *BMW* guideposts that lower courts are to consider. Nor are they asking the Court to rule that lower courts are prohibited from considering a particular type or category of evidence in applying the *BMW* factors. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003) (holding that a defendant's misconduct that is dissimilar to the conduct giving rise to the claim and harm suffered by the plaintiff cannot serve as the basis for punitive damages); *BMW*, 517 U.S. at 572–73 (holding that lawful out–of–state conduct that does not have an impact on the state or its residents cannot serve as a basis for punitive damages). Petitioners do not take issue with the application of the *BMW* factors in a manner that transcends this case and would

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[11] In this instance, the ratio was remarkably low. The $50 million punitive damage award imposed against each petitioner was only 0.42 times the nearly $120 million in compensatory damages.

establish a new legal proposition generally applicable to future punitive damage cases. They argue instead that the Trial Court must have misapplied the *BMW* factors because it found the punitive damage awards to be warranted. Though cloaked as a request that this Court provide guidance to lower courts, petitioners in reality simply disagree with the Trial Court's application of those well–established factors to the facts of this case.

This Court is not a court of error correction. A properly–instructed jury imposed the punitive damage awards in this case after a five–week trial. While petitioners are entitled to believe that that the jury, the Trial Court, and the WV Supreme Court were all incorrect, they are not entitled to a third attempt to convince a tribunal that the jury was wrong.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

DAVID B. FAWCETT
(COUNSEL OF RECORD)
GREGORY J. KROCK
BUCHANAN INGERSOLL & ROONEY PC
ONE OXFORD CENTRE
301 GRANT STREET, 20TH FLOOR
PITTSBURGH, PA 15219–1410
(412) 562–8800

COUNSEL FOR RESPONDENTS

Dated: October 22, 2008

APPENDIX

APPENDIX A

CASE 05-C-85 BROOKE

WHEELING PITTSBURGH STEEL CORP vs.
CENTRAL WEST VIRGINIA ENERGY C

LINE	DATE	ACTION
1	04/27/05	CASE FILED
2		CIVIL CASE SHEET
3		COMPL WITH EX "A" ATTACHED
4		SUMM,COMPL & NOTICE OF SERVICE ISSUED & SENT TO SOS FOR
5		SERVICE ON CENTRAL WV ENERGY CO.
6		NOTICE OF SERVICE BY FIRST CLASS MAIL
7		FILE COPY OF SUMMONS.
8	05/07/05	SUM/COMP RTRND BY SS. ACPTD SRV FOR CENTARL WV ENERGY, 4/28/05
9		CM RTRN CARD FOR CEANTRAL WV ENERGY BY H. BURFORD, 5/2/05
10	05/12/05	COS OF PLTF'S 1ST REQST FOR PROD OF DOC
11		MOT FOR ADMNS PRO HAC VICE/COS E. EXS
12		ORD ADMTNG DAVID B FAWCETT & GREGORY J KROCK PRO HAD VICE IN

13		CV BK 70 PG 741
14	05/17/05	MOT FOR ORD AUTHORIZING ISSURANCE OF SUBP DUCES TECUM DIR TO
15		KINDER MORGAN BULK TERMINALS
16		ORD AUTHORIZING ISSUANCE OF SUPB DUCES TECUM IN CV BK 70 PG 751
17	06/01/05	NOT OF REMOVAL BY DEF, CENTRAL WV ENERGY CO/COS
18	09/01/05	FED ORD GRNTNG PLF'S MOT TO REMAND & DENYNG MOT TO TRANFER VENUE
19		AS MOOT
20		CV DOCKET FROM DISTRICT COURT

* * *

860	09/04/07	ORD DENYING DEF'S MOT & MEMO FOR JDGMNT AS A MATTER OF LAW OR IN
861		ALT, A NEW TRIAL ON THE BREACH OF CONTRACT CLM IN CV BK 76
862		PG 138
863		ORD DENYING PLTF MTN ST CARBON'S MOT TO AMEND FINDINGS AND/OR
864		FOR NEW TRIAL ON SUPLMNTL CNTRCLM IN CV BK 76 PG 139
865		ORD DENYING DEFS' JOINT

		MOT FOR JDGMNT AS A MATTER OF LAW OR IN
866		ALT, A NEW TRIAL BASED UPON THE JURY'S RTRN OF THE VERDICT IN
867		CV BK 76 PG 140
86	09/13/07	TRANSCRIPT OF PROCEEDINGS HELD ON 7/30/07
869	09/25/07	DEFS' JOINT RSPNS TO PLTFS' MOT PURSUANT TO WVRCP 62 FOR AN ORD
870		REQUIRING DEFS T OPOST TWO BONDS/COS
871	10/25/07	ORD OF 9/28/07 WITH CPY OF SURETY BOND FORM AS EX 1 IN CV BK 76
872		PG 386-389
873		DEFS' TENDER OF JOINT APPEAL BOND/COS
874		DEFS' JOINT APPEAL BOND
875		POWER OF ATTY
876	12/10/07	DF'S MASSEY ENERGY CO. DSGNTN OF RCRD W/COS
877		DCKTNG STMNT W/COS MASSEY ENERGY
878		PET FOR APPEAL W/COS MASSEY ENERGY
879		DCKTNG STMNT W/COS CENTRAL WV ENERGY
880		PET FOR APPEAL BY CENTRAL WV ENERGY CO.
881	01/10/08	CM RCPTS ##2234, 2265, 2241,

		2210, 2258, 2227
882		RCPT FROM POST OFFICE
883	01/14/08	6 CM RTRND CARDS FOR WV SUPREME COURT SIGNED BY KATHY THOMAS, 1/
884		11/08
885	06/02/08	CERT CPY OF ORD OF 3/12/08 FROM SUPREME COURT REFUSING APPEAL
886		ENTRD IN CV BK 77 PG 487 (MASSEY ENERGY)
887		CERT CPY OF ORD OF 3/13/08 FROM SUPREME COURT REFUSING APPEAL
888		ENTRD IN CV BK 77 PG 488 (CENTRAL WV ENERGY CO.)
889	07/01/08	CERT CPY OF ORD FROM SUPREME COURT STAYING THE JDGMNT ENTERED IN
890		BRK COUNTY CIRCUIT COURT ENTRD IN CV BK 77 PG 598-59
891	08/25/08	LETTER U.S. SUPREME COURT STATING PET FOR WRIT OF CERTIORARI WAS
892		FILED 8/20/08 & DOCKETED ON 8/21/08 AS NO. 08-217